IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

RAYMOND DOWNUM and EDNA DOWNUM, husband and wife,
Appellees.

No. 12,162

On Appeal From the District Court of the United States for the District of Idaho, Northern Division

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Hon. Chase A. Clark, Judge

BRIEF OF APPELLEES

W. J. Nixon,
Bonners Ferry, Idaho.

Geo. W. Young,
502 *Paulsen Bldg.*
Spokane, Washington.
Attorneys for Appellees.

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OPINION BELOW

The trial court rendered an oral decision not reported in the transcript other than in the clerk's minutes (Tr. 18).

JURISDICTION

Jurisdiction of this action is conferred upon the Court by the terms of the Federal Tort Claims Act, 28 U.S.C.A. 931 et seq.

APPELLEES' STATEMENT OF THE CASE

We believe that appellant's statement of the case is insufficient and therefore, inasmuch as this case is essentially one of fact, choose to make additional statement.

This action was commenced and maintained under the Federal Tort Claims Act. The plaintiffs by their complaint alleged in substance that on or about the 14th day of May, 1947, plaintiff, Raymond Downum was driving a truck over and along a highway approaching Bonners Ferry, Idaho; that one Corporal Clyde W. Smith was driving a truck belonging to defendant during the course of his employment, and under the direction of defendant, approaching the vehicle driven by plaintiff; that as a result of the negligence of Corporal Smith, a collision occurred which occasioned the injuries and damages suffered by plaintiff.

FACTS DISCLOSED BY EVIDENCE

On the 14th day of May, 1947, appellee, Raymond Downum, was in perfect health (Tr. 77). He was aged 35 years, a husband and father of three children, whose vocation was limited to that of farmer and laborer (Tr. 68). While driving a Model A Ford truck over a highway in northern Idaho, approaching the village of Bonners Ferry, he came in collision with a 1½ ton dump truck driven by one Clyde W. Smith under the direction of the defendant. The negligence of Corporal Smith is not questioned.

As a result of the negligence of Corporal Smith, appellee sustained horrible and disabling injuries to his person. His skull was fractured; his face and nose smashed to a pulp (Tr. 48, 83, 127). His chest was burned (Tr. 82). He sustained a cranial nerve injury which produced permanent double vision (Tr. 75, 127, 133). The brachial plexus of his right shoulder was injured resulting in a diminishment of nerve supply to his right arm and hand (Tr. 117). His hand became weakened and the muscles thereof atrophied (Tr. 103). The shafts of both femurs were shattered (Tr. 77, 92, 96) and the right knee cap was fractured (Tr. 92). The tear duct of one eye was destroyed (Tr. 129).

He was thrown immediately into shock. When first discovered, he was in grave danger of death (Tr. 89).

He suffered excrutiatingly from pain (Tr. 49, 72, 75). He was hospitalized from the date of the accident, May 14, 1947, until December 22, 1947 (Tr. 72, 73).

His body was encased in casts (Tr. 91). The shaft of one thigh is held together with two bolts and nine screws which extend into the soft tissue and cause him pain upon pressure (Tr. 80, 99).

He was totally disabled for all purposes for a period of one year (Tr. 125). At the time of trial, to-wit: June 10, 1948, he was more than 80% disabled (Tr. 125). His face was disfigured by permanent scars and his nose grossly deviated from mid-line (Tr. 128, 129). He walked with difficulty assisted by the use of a cane (Tr. 143). He cannot kneel nor normally bend his knees (Tr. 101, 105). He will be disabled for all future purposes to the extent of 75% of total (Tr. 109). He was 5' 11'' in height prior to his injury, and 5' 9'' following his injury (Tr. 162).

At the time of his injury, and for some years before, he was capable and did earn substantial annual income, the evidence of such being as follows:

Income for the year 1942	$3,039.22	
Income for the year 1943	3,696.73	
Income for the year 1944	4,104.12	
Income for the year 1945	4,459.51	
Income for the year 1946	5,007.50	(Tr. 80, 81)

In addition, he sold a ranch in 1947 and made a capital gain of $6,382.19 (Tr. 80, 81).

The Honorable Chase Clark, after seeing the plaintiff and hearing the testimony, was of opinion that plaintiff had suffered damages generally in the sum of $58,500.00 and made an award to him in that amount, plus the special damages proved, or a total award of $64,973.88 (Tr. 18, 23, 24).

SUMMARY OF ARGUMENT

The judgment and findings of the trial court should be sustained because they are supported by substantial evidence.

ARGUMENT

The trial judge had before him the plaintiff. He was in a position to see the wretched physical condition of the plaintiff. His personal view accompanied by x-ray evidence, supported by testimony of plaintiffs' physicians, which testimony was not seriously disputed in any major particular, placed him in a better position to evaluate the damage sustained by the plaintiff than would this honorable court.

> "It is a well established principle that the trial court's findings of fact upon conflicting evidence will be binding on appeal and will not be disturbed by the appellate court where they are reasonably supported or sustained by some substantial, credible and competent evidence, and where no error prejudicial to the appellant oc-

curred in the ruling on the admission of evidence." 3 *Am. Jur.* (Appeal & Error) Sec. 901, p. 469-70

Shopleigh v. Mier, 299 U.S. 468, 81 L. Ed. 355, 57 S. Ct. 261. 113 A.L.R. 253;

LaGrada v. U.S. (CCA 8th), 77 F (2d) 673, 103 A.L.R. 527, writ of certiorari denied in 296 U.S. 629, 80 L. Ed. 477, 56 S. Ct. 152;

Consolidated Flour Mills v. Ph. Orth. Co., (CCA 7th) 114 F (2d) 898, 132 A.L.R. 697.

There is no set rule or formula for the admeasurement of damages to be allowed for personal injuries. *Missouri Pacific Transp. Co. v. Simon,* 135 S.W. (2d) 336.

An award of $100,000.00 was sustained by the California Supreme Court where the plaintiff suffered multiple injuries. *McDonald v. Standard Gas Engine Co.,* 47 P. (2d) 777, 8 Cal. App. (2d) 464.

ARGUMENT IN ANSWER TO APPELLANT

Under the heading Argument, appellant's brief pp. 7-11, appellant charges the trial court with error in using a mortality table in arriving at the life expectancy of appellee, stating:

> "The transcript of record discloses nothing regarding appellee's physical condition prior to the accident * * * ."

and then argues that because of the claimed deficiency of evidence, it was improper for the trial court to use a mortality table in arriving at the life expectancy

of appellee.

This argument is specious. The appellant apparently ovevrlooked testimony concerning the health picture of appellee before his injury:

Q. Before this injury, what was your general health, what kind of shape were you in?

A. Perfect.

Q. In good condition?

A. That's right.

Q. Working every day, were you?

A. Yes sir. (Tr. 77)

In addition to the foregoing, there is testimony that appellee was a farmer and a worker out of doors. He must have been in excellent condition because he survived injuries which would have killed a less robust person.

Appellant's argument, sub-division 2, pp. 11-19, consists of an attack on the trial court's order amending the findings in this case. *The record shows that appellant moved to amend the Findings of Fact* (*Tr.* 27) and that as a counter motion, appellee moved to strike appellant's motion for an order amending and correcting Findings of Fact, or in the alternative to amend Findings of Fact 6 to the effect that the plaintiff (appellee here) had a life expectancy of 39

years according to a table contained in the World Almanac and Book of Facts for 1948, p. 449 (Tr. 28). The trial court denied appellee's motion but did amend its findings on *motion of appellant,* the ordering part as disclosed by the Court's minutes stating: "Counsel for plaintiff was instructed to redraw finding in accordance with the court's oral opinion" (Tr. 29). The court's oral opinion is found in the minutes of the clerk (Tr. 18):

> "I find for plaintiffs $3,000.00 for disability the first year; $58,500 general damages, including future expenses; and $3,473.88 specific expenses."

Certainly the appellant cannot complain of the sustaining of its own motion to have findings amended, and it is obvious that the amended findings simply conform to the original award in the oral pronouncement of the court at the conclusion of the taking of testimony. This action of the court would appear to be permissible under Rule 60-a of the Federal Rules of Civil Procedure.

Appellant employs rather an ingenious argument, using annuity valuation tables as applied to the case at bar. The trial court did not use annuity tables in measuring appellee's damage.

> "Mathematical computation. The amount of recovery cannot be reduced to a mere matter of mathematical computation; hence it cannot be

> measured by taking a sum the interest on which would produce the amount previously earned by the plaintiff, nor do rules, to be derived from standard life and annuity tables, furnish an absolute guide for the discretion of the jury." 25 *C.J.S.* (Damages) Sec. 81, p. 595.

Factors to be considered in arriving at the ultimate award are pain, suffering, disfigurement, future corrective surgery, and past and future loss of earnings proved with reasonable certainty, all of which are present in the case at bar.

It must be borne in mind that in actions brought under the Federal Tort Claims Act, the right of trial by jury is denied. The judgment of the trial court is substituted for that of a jury. In this case, it would appear that the trial court is firmly of opinion that appellee's injuries and disability were such as to justify the award. The trial court had an opportunity to change the award. In fact such change was pressed upon him, but he refused.

The following is a pertinent quotation from the Montana Supreme Court in a case where a plaintiff's award in the sum of $76,112.00 was sustained:

> "The trial judge, with the jury, sat through the harrowing details of the accident and the long drawn out campaign to rehabilitate, so far as possible, the wreck of a human being left by the accident; saw plaintiff's condition and was able to understand, in some measure, the agony and suffering through which he had passed." *Fulton v. Chauteau County Farmers' Co.,* 37 P. (2d) 1025 at 1034

Counsel for appellant appear to distort fact when they assert at page 13 of their brief "that he was incapacitated to a degree of 60% and was earning at least $3,000.00 a year. He has an earning capacity on his own of 40% or $1200.00 for the balance of his life." The undisputed fact is that appellee's disability for all purposes is 60% to 75% (Tr. 124). We consider this point sufficiently important to set forth for the convenience of this court, the testimony establishing the percentage of disability.

> THE COURT: Doctor, if you were fixing a percentage such as Doctors fix in the young men at the veterans hospitals, in fixing the percentage of disability for the Government such as they do, what would you fix? That is also taking into consideration all the things that could asked you about?
>
> (DR. GRIEVE) A. Well, the Veterans administration seem quite generous in most cases. I would say in this man's case it is sixty to seventy-five per cent.
>
> Q. THE COURT: That is the amount of disability he will have? A. Yes, sir.
>
> THE COURT: I take it he was totally disabled all the time he was under your care?
>
> A. Yes sir.

THE COURT: What do you consider to be his disability at this time, what is the percentage of disability to work right now?

A. I think it is over seventy-five per cent right now; it is eighty per cent or more now. He cannot work a full eight hours, he cannot be on his feet for any length of time, and he cannot be on the job at all for a full working shift. (Tr. 124-125)

The testimony with respect to disability was not questioned by appellant's expert medical witness. Therefore we believe that we may fairly assert on behalf of appellee on the basis of all of the testimony that his permanent total disability is seventy-five per cent of total for all purposes.

Moreover, we believe that it is fairly evidenced, taking into consideration appellee's past earning record, that he would with reasonable certainty, have earned a greater sum than $3,000.00 annually. His average annual earnings from the year 1942 to 1946 is $4,061.41, exclusive of the capital gain of $6,382.19 realized from the sale of his farm (Tr. 80, 81).

It is generally recognized by writers of judical opinions that each personal injury case, insofar as amount of recovery is concerned, should be individually treated. No two cases are exactly alike although there

may be comparable features. It is impossible to adequately describe the injuries and the effect thereof upon the appellee. To properly appreciate them, one must see him as an aid to interpretation of the descriptive testimony of his injuries by both lay and expert witnesses. There are but few cases reported where a litigant sustained injuries in the number and severity as was sustained by the appellee for the obvious reason that where such injuries occur, the normal end result is death. We have cited two cases where recoveries were sustained on comparable injuries in excess of the amount allowed here. *McDonald v. Standard Gas Engine Co.,* 47 P. (2d) 777, 8 Cal. App. (2d) 464; *Fulton v. Chateau County Farmers' Co.,* 37 P. (2d) 1025. We assert that the award in this case should have been more than that allowed by the trial court, but in any event, it does not represent anything other than fair compensation.

CONCLUSION

We respectfully submit that the recovery allowed by the trial court was not excessive, taking into consideration all of the factors which appear in this case, and should be affirmed.

Respectfully submitted,

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